

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KELLY GRISWOLD**

Claimant

VS.

**STATE OF KANSAS**

Respondent

AND

**STATE SELF INSURANCE FUND**

Insurance Carrier

Docket No. 1,029,801

**ORDER**

Claimant requested review of the August 4, 2006, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant did not suffer personal injury as that term is defined in K.S.A. 2005 Supp. 44-508 and denied claimant's request for temporary total disability compensation and medical treatment.

Claimant argues that she experienced temporary physical injury and has been diagnosed with a psychological response to her physical/sexual assault. She argues that she experienced physical symptoms, including pain and aching, which satisfies the definition of personal injury in K.S.A. 2005 Supp. 44-508, even though the pain lasted only a few minutes. She asserts that nowhere in the definition does it require the damage or harm to be permanent. Accordingly, she requests that the Board reverse the Order of the ALJ denying temporary total disability compensation and medical treatment.

Respondent argues that although claimant was touched, this did not result in a physical injury as defined in K.S.A. 2005 Supp. 44-508. Respondent, therefore, requests that the ALJ's Order be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a juvenile corrections officer at the Atchison Juvenile Corrections Facility. Her job consisted of maintaining the safety and security of the residents and the staff.

Claimant's Application for Hearing lists two dates of accident, June 1, 2005, and May 26, 2006. On each date, she was sexually assaulted by a juvenile resident. Claimant did not receive any medical treatment or counseling after the June 1, 2005, incident but had a period of time when she was wetting the bed and having nightmares. She did speak with a staff social worker.

Claimant testified that on May 26, 2006, one of the residents was required to write a letter describing things he was not supposed to do when he was angry and also write some apology letters to staff members. Residents are not allowed pencils in their rooms for safety reasons, and claimant took the resident a pencil and some paper. As the resident finished writing each apology letter, claimant would approach him and read over the letters. When he finished writing the last letter, claimant told him to rewrite it. When he indicated he had finished, she walked over to him. At that point, the resident lunged toward her, grabbed one of her breasts with his left hand, and squeezed. As claimant backed away from him, he continued to have hold of her breast. She finally grabbed the pencil from his right hand and got away from him. She secured the door to his room and went back to her desk.

Claimant stated that she wears a jacket at all times when she works, and that she was grabbed hard enough that she felt it through to her breast. She stated she felt an uncomfortable tightness, almost like a tingling sensation. She continued to feel this pain for several minutes. She reported the incident to her shift manager and was told to leave the campus long enough to get a soft drink. When she returned to the campus, she wrote out a report of the incident and left work two hours before her shift ended.

Claimant had scheduled vacation time for the two days after the incident, and then took off the next Monday and Tuesday, which are her usual days off. When she returned to work, she met with her superintendent and told her that she felt anxious and was sick to her stomach. Her superintendent recommended that she call Lifeline, an employee assistance program. She met six times with a counselor through that program. Thereafter, claimant stopped using this counseling service because she would be responsible for paying for any visits after the first six.

Claimant saw Dr. Steffan Shamburg on June 19, and he took her off work for a few days. Then she again took vacation leave on June 21 through June 26. As the days came

nearer to June 27, when she was to return to work, she became more anxious. She started getting headaches, had constant nausea, and spent a lot of time in bed because she did not want to deal with going back to work. She stated that she was afraid of getting physically attacked again.

Claimant visited again with Dr. Shamburg on June 27, at which time he again restricted her from working. She has not been released to return to work. Dr. Shamburg is of the opinion that claimant is suffering from significant anxiety with associated physical complaints related to the "assault and physical trauma that she suffered as described above."<sup>1</sup>

Claimant has also seen Robert Schulman, Ph.D., a licensed psychologist. Dr. Schulman diagnosed her with generalized anxiety disorder and recommended medication and counseling, as well as a behavioral treatment involving eye movement desensitization and restructuring. He opined that claimant's current difficulties and anxiety are the result of the touching and physical assault which occurred on two occasions.

Claimant stated that after the June 1, 2005, event, although she had some anxiety, she was able to return to work. She testified, however, that her feelings of anxiety, paranoia, and physical problems were dramatically worse after the May 26, 2006, incident.

The ALJ denied claimant's request for medical treatment and temporary total disability compensation because "[c]laimant did not suffer personal injury as that term is defined by K.S.A. 44-508."<sup>2</sup> There is no further explanation for the ruling. Although not entirely clear, it appears that the ALJ determined that the physical trauma claimant sustained was insufficient to cause an injury or did not otherwise constitute an injury. K.S.A. 2005 Supp. 44-508(e) provides:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In addition, K.S.A. 2005 Supp. 44-508(d) defines "accident" as

an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation

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<sup>1</sup> P.H. Trans., Cl. Ex. 1 at 5.

<sup>2</sup> ALJ Order (Aug. 4, 2006).

of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

There is no predetermined amount of force or trauma that is required to constitute an accident or an injury under the Kansas Workers Compensation Act. Furthermore, there is no requirement that an injury be permanent in order for a claimant to be eligible for preliminary hearing benefits. To the contrary, temporary total disability benefits as well as temporary partial disability benefits compensate, by definition, for temporary conditions. Likewise, medical treatment is provided “to cure and relieve the employee from the effects of the injury.”<sup>3</sup> Obviously, any injury that is cured was a temporary injury. The same holds true for injuries that do not require medical treatment. In this case, claimant was subjected to forceful, unwanted touching that caused her significant pain, as well as fear, anxiety and emotional torment. That physical pain she experienced was a manifestation of injury. It is not unusual in workers compensation to award compensation in cases where the only manifestation of injury is pain which cannot be documented or confirmed by objective testing.

In *Casey*,<sup>4</sup> the ALJ “denied Casey any benefits and concluded there was no ‘sudden and unexpected event or events’ and no ‘manifestation of force’ that would constitute a personal injury by accident.” The Board reversed, finding claimant’s allergic reaction, while temporary, was nonetheless an accident and injury. The Court of Appeals affirmed, holding: “Although Casey’s allergic reactions are not an occupational disease, we find that they are a compensable work-related injury.”<sup>5</sup> The court further held:

The ALJ’s conclusion that Casey’s condition was not a work-related injury is too narrow a reading of the workers compensation statutes. The definition of the term “accident” does not limit itself to injuries caused by a manifestation of force. See K.S.A. 2004 Supp. 44-508(d). An accident can be an undesigned and unexpected event of an afflictive nature not necessarily accompanied by a manifestation of force. This interpretation, as required by the accident definition in K.S.A. 2004 Supp. 44-508(d), is necessarily ‘designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.’<sup>6</sup>

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<sup>3</sup> K.S.A. 44-510h(a).

<sup>4</sup> *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 68, 114 P.3d 182, rev. denied 280 Kan. \_\_ (2005).

<sup>5</sup> *Id.* at 74.

<sup>6</sup> *Id.* at 74-75.

Claimant in this case has met her burden of proving that she suffered personal injury by accident arising out of and in the course of her employment with respondent on May 26, 2006.<sup>7</sup> Accordingly, claimant is entitled to consideration of her request for an award of the preliminary hearing benefits of medical treatment and temporary total disability compensation. As the ALJ did not make a determination of whether claimant is temporarily or wholly disabled and in need of medical treatment and, if so, whether that need is directly traceable to her work-related accident and injury, this matter must be remanded to the ALJ for his determination on those issues.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>9</sup>

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 4, 2006, is reversed and remanded for further orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2006.

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BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant  
Shelley H. King, Attorney for Self-insured Respondent  
Bryce D. Benedict, Administrative Law Judge

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<sup>7</sup> See *Rivera v. Sam's Wholesale Club*, No. 162,366, 1995 WL 305178 (Kan. WCAB Mar. 31, 1995).

<sup>8</sup> K.S.A. 44-534a.

<sup>9</sup> K.S.A. 44-555c(k).